No. 88-25

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE CELOTEX CORPORATION, *et al.*,
Petitioners,

v.

JOHN HOWARD GRIMES, and
DORIS E. SAUNDERS, Personal Representative
of the Estate of Melvin H. Saunders,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit correctly applied the governing precedents of this Court, and appropriately balanced the relevant interests of the parties, in declining to give retroactive effect to a prior decision that had overruled established circuit law with respect to the statute of limitations applicable to shipyard asbestos-exposure claims.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Celotex Corporation *et al.* seek review of a decision of the Court of Appeals for the Fourth Circuit holding that an earlier Fourth Circuit opinion would not be applied retroactively to bar respondents' asbestos-related claims. The case involves a conventional and fact-specific application of this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). For that reason, and because the judgment below is plainly correct, respondents respectfully request that the petition for a writ of certiorari be denied.

STATEMENT

Respondents Melvin H. Saunders and John H. Grimes are former employees of the Newport News Shipyard who became totally disabled by asbestosis and/or mesothelioma, incurable lung diseases caused by the inhalation of asbestos fibers.[1] Both respondents first learned that they had contracted an asbestos-induced disease several months after a unanimous panel of the Court of Appeals for the Fourth Circuit had held that admiralty's equitable doctrine of laches, rather than Virginia's two year statute of limitations, governed tort actions arising out of the shipyard installation of maritime asbestos products.[2] *See White v. Johns-Manville, Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). In reliance on this decision, respondents postponed filing suit until December, 1983 and May, 1984, respectively—well within the limitations period under admiralty law but several weeks after Virginia's then-current statute of limitations had expired.[3]

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[1] Melvin H. Saunders died of mesothelioma on September 8, 1986. A motion to substitute Saunders' wife as appellant was granted by the Court of Appeals for the Fourth Circuit on February 11, 1987. To facilitate presentation of the background of the case, we refer to Mr. Saunders as "respondent."

[2] For maritime causes of action accruing since October 1980, a new federal three-year "discovery" statute of limitations, rather than the equitable laches doctrine, applies. *See* 46 U.S.C. § 763a. The Court below found that respondents' claims would be timely regardless of which version of admiralty law applies. Pet. App. 5a.

[3] At the time they filed suit, the Virginia Supreme Court had held that the statute of limitations expired two years after a disease became "diagnosable," regardless of whether the plaintiff knew (or had reason to know) of the illness. *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981). In 1985, the Virginia General Assembly amended the limitations statute to provide that in asbestos-related cases the cause of action accrues, and the limitations period begins to run, only when a physician communicates a

On June 6, 1985, the Court of Appeals for the Fourth Circuit, sitting *en banc*, overruled *White*'s holding that admiralty jurisdiction extended to asbestosis cases brought by land-based shipyard employees. *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir.), *cert. denied*, 106 S. Ct. 351 (1985). *Oman* arose out of the same litigation that had given rise to the earlier decision in *White*, *supra*. After the defendant-manufacturers in *White* had unsuccessfully sought a writ of *certiorari* from this Court, the case was remanded to the District Court. On remand, the *Oman* plaintiffs prevailed, and the defendants appealed, again contending that the claims were not cognizable in admiralty. Before the appeal was argued, the manufacturers moved to have the admiralty issue set for initial *en banc* consideration. In so doing, they pointed out that several other circuits had rejected *White*'s reasoning. Nevertheless, in March, 1983, the Court of Appeals denied the motion for *en banc* review, thus signaling, at least to all outward appearances, that the question had been finally resolved within the circuit. More than a year later, however, on June 6, 1984—after argument before a panel but before any decision had been rendered—the court, *sua sponte*, set *Oman* for argument *en banc*.

After the decision in *Oman*, petitioners here moved to dismiss respondents' claims as time-barred. The district

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diagnosis of an asbestos-related illness to the injured party. Va. Code § 8.01-249(4).

Respondent Saunders received a confirmed diagnosis of asbestosis on March 16, 1982, less than two years from the date he filed suit (December 9, 1983). Accordingly, he has maintained that his suit is timely even if Virginia law applies, since Va. Code § 8.01-249(4) was intended to apply retroactively. In light of its resolution of the case on other grounds, the Court of Appeals did not address this issue. Respondent Grimes received a confirmed diagnosis on February 22, 1982, more than two years before he filed suit. Thus, he concedes that his claim is barred if Virginia law applies.

court granted the motion, rejecting respondents' contention that the decision in *Oman* should not be given retroactive effect under the three-part test set out in *Chevron*, *supra*.[4]

The Court of Appeals unanimously reversed. The court began its analysis by observing that "[w]hen Saunders and Grimes filed their claims: 1) a unanimous panel of the Fourth Circuit had expressly held that admiralty jurisdiction applied to such cases . . . ; 2) the Supreme Court had denied certiorari in *White* . . . ; and 3) the Fourth Circuit had denied a later petition to reconsider *White* . . . *en banc*." Pet. App. 8a. Because *Oman* had thus "overrul[ed] clear past precedent" on which respondents "may have relied," the court concluded that the first of the *Chevron* factors was plainly satisfied. *Chevron*, *supra*, 404 U.S. at 106. The same was true of the second, the court found, since a decision not to apply *Oman* retroactively would not "retard" the operation of the new rule. *Chevron*, *supra*, 404 U.S. at 107. In this regard, the court observed that there was no need "for a national uniform statute of limitations" in this context, and, further, that non-retroactivity would not violate any interest identified by Virginia since there was "no evidence that Saunders or Grimes delayed filing claims in order to sabotage appellees' defense." Pet. App. 10a.[5] Finally, the court concluded that a balance of the equities —the third *Chevron* factor—clearly favored respondents. While they had reasonably relied on clear circuit precedent, the manufacturers, in contrast, never had a legitimate "expectation that they would be shielded from liability." *Id.* at 11a.

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[4] The court also rejected respondent Saunders' argument that his claim was timely even if Virginia law supplied the governing statute of limitations. *See supra* note 3.

[5] Senior Judge Haynsworth believed that the second *Chevron* factor was "essentially neutral," but otherwise concurred in the majority's analysis. Pet. App. 11a.

ARGUMENT

This case does not warrant further review for two reasons. First, the Court of Appeals' conclusion that *Oman* should not be applied retroactively to bar respondents' claims was plainly correct. Second, even if there were some doubt about the merits of this ruling, the case involves a straightforward application of well established principles. Moreover, as the court below observed, it affects "[o]nly a limited and identifiable class of possible claimants." Pet. App. 10a. For these reasons, the case does not implicate a question of sufficient national or legal significance to merit resolution in this Court.

I. The Ruling Below Was Clearly Correct.

In *Saint Francis College v. Al-Khazraji*, —— U.S. ——, 107 S. Ct. 2022, 2025-26 (1987), this Court reaffirmed that "a decision specifying the applicable state statute of limitations should be applied only prospectively" if: (1) it "overruled clearly established circuit precedent on which the complaining party was entitled to rely;" (2) prospective-only application would not disserve "the purpose of the underlying substantive statute;" and (3) retroactive application would be "manifestly inequitable." *See also Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S. Ct. 2617 (1987); *Chevron*, *supra*. As the Court of Appeals correctly found, each of these considerations is satisfied under the circumstances presented here.

Because *Oman* expressly repudiated *White*'s unequivocal holding that "the exercise of admiralty jurisdiction is proper . . . [and] the application of Virginia's two year limitation period . . . was error," there can be no doubt that the decision "overruled clearly established circuit precedent." *White*, *supra*, 662 F.2d at 241. *See Oman*, *supra*, at Pet. App. 34a. Nor can it be seriously argued that respondents were not "entitled to rely" on it. As of March 1983, both of their claims were still timely

under Virginia law. On that date, the Court of Appeals denied without dissent the manufacturers' petition for *en banc* consideration of the very issue later decided in *Oman*. Thus, at this crucial moment—when the appellants were still able to pursue their claims under Virginia law—the court put forth an unmistakable signal that *White* was, and would continue to remain, good law in the Fourth Circuit. At minimum, it was reasonable for respondents—who obviously had every incentive to take all steps necessary to preserve their claims—to construe the denial of the manufacturers' petition in that fashion.

Petitioners place considerable emphasis on the fact that several other circuits had declined to adopt *White*'s reasoning prior to the time the Virginia statute of limitations ran. This emphasis is misplaced for several reasons. First, as this Court recently observed, the first *Chevron* factor looks principally to whether the new decision overruled "clearly established *circuit* precedent." *Al-Khazraji*, *supra*, 107 S. Ct. at 2025 (emphasis added). That focus is particularly appropriate where, as here, the law in the circuit seemed so secure. Petitioners fail to mention, for example, that the Fourth Circuit's 1983 refusal to consider the admiralty issue *en banc* occurred at a time when two sister circuits had *already* rejected *White's* holding.[6] As importantly, petitioners are simply incorrect in suggesting that the existence of a split among the circuits invariably portends a reversal of one of the decisions. This very case proves the point. At a time when respondents' claims were still timely, this Court declined to review the question of admiralty jurisdiction in shipyard asbestos cases notwithstanding the existence of a clear division on the issue in the Courts of Appeal.[7]

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[6] *See Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir. 1983).

[7] *Compare White, supra with Keene Corp., supra.*

In light of this history, petitioners' suggestion that respondents did not reasonably rely on "clear past precedent" borders on the frivolous.[8]

The other *Chevron* factors also weigh decisively in favor of respondents. As the Court of Appeals correctly held, avoiding the injustice of subjecting a discrete group of plaintiffs to one statute of limitations, after they had been led to rely on another, hardly "retards" the operation of the new rule. And there is no serious dispute that retroactive application of *Oman* "would produce substantial inequitable results." *Chevron, supra*, 404 U.S. at 108 (citations omitted). When the Court of Appeals denied rehearing *en banc* in 1983—almost two years after the initial decision in *White*—respondents still had ample time to file under Virginia law. Penalizing them for not having had the clairvoyance to predict that the full court, on its own initiative, would later change its mind would generate exactly the kind of injustice *Chevron* is intended to avoid.[9]

II. There is No Reason to Review This Fact-Specific Application of a Well Established Legal Principle.

Even assuming that this Court were to have doubts about the merits of the decision below, there still would be no reason to grant review here. To begin with, the

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[8] As the Court of Appeals correctly held, respondents need not prove actual reliance. *Chevron* requires only that they show the existence of "clear past precedent on which [they] *may* have relied." 404 U.S. at 106 (emphasis added). *See* Pet. App. 8a-9a.

[9] By the same token, giving *Oman* prospective-only force would cause no real inequity to defendants. Most of the manufacturers' tortious acts took place prior to 1970, at a time when *all* torts that occurred on navigable waters were cognizable in admiralty. *See generally, Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). As a result, petitioners could not have had any expectation that shipyard exposures would be shielded from application of maritime principles.

circumstances that gave rise to this case are extremely unlikely to recur. As the Court of Appeals observed, "[o]nly a limited and identifiable class of possible claimants, those who were entitled to rely on *White* . . ., will be able to take advantage of the nonretroactive application of *Oman*." Pet. App. 10a. Moreover, since every other court rejected *White*'s admiralty ruling in the first instance, the narrow retroactivity question presented here cannot possibly arise in another circuit.

As importantly, the case is devoid of anything that even approximates the kind of novel or important legal question that warrants review in this Court. Petitioners attempt to manufacture such an issue by suggesting that the court below—contrary to the approach in other circuits—focused exclusively on circuit precedent to evaluate whether respondents' reliance on *White* was justifiable. The argument does not survive even cursory examination of the Court of Appeals' decision. Explicitly guided by this Court's approach in both *Al-Khazraji* and *Goodman Steel*, the panel did carefully examine the tortuous history of *White* in the Fourth Circuit. But one searches the opinion in vain for anything like a categorical rule that a court may consider *only* the law of the circuit in making this assessment. Eschewing any such pronouncement, the Court simply held that—under the particular circumstances of this case—respondents' reliance on the continued vitality of *White* was entirely reasonable. As noted above, that fact-bound determination is beyond reproach and should not be disturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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